Supreme Court, U.S.
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No. 96-1347

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

GARY VICKERY,
Petitioner,
v.

JANELL JONES, WILLIAM PEARMAN, KIRK BROWN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT STATE OFFICIALS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition for Writ of Certiorari ("Petition") identifies the following questions as those presented for review:

"1. Is a political party's participation in a patronage system, whereby the State Respondents delegate to the Party Respondents the selection of persons for public employment positions, protected by the First Amendment to the United States Constitution?

2. Did the Complaint state a cause of action against the Party Respondents?

3. Given the facts in this case, were the State Respondents entitled to qualified immunity when temporary employment positions were filled on a political basis?

4. By the spring of 1992, was the law clearly established that non-civil service public employment positions could not be filled based on political affiliation or political sponsorship unless the position fell under the exemptions defined by the United States Supreme Court in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976); *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980) and *Rutan v. Republican Party*, 497 U.S. 62, 110 S. Ct. 2629 (1990)?

5. By the spring of 1992, was the law clearly established that the nature of the position, not the duration of the public employment position, governed whether or not the public employment position could be filled politically?"

PARTIES TO THE PROCEEDINGS

The parties are properly identified in substance in the Petition, except that "Janell Jones" is now known as "Janell Hilgers"; William Pearman's title was "Bureau Chief of Personnel Management"; and Kirk Brown was the "Secretary of the Illinois Department of Transportation," not a "Director."

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INTRODUCTION

Petitioner Gary Vickery ("Petitioner") represents a class of plaintiffs who contend that their First Amendment rights were violated when they were not appointed as temporary highway maintainers by the Illinois Department of Transportation ("IDOT") because of their political affiliations. Petitioner argues that the actions of the respondent State officials Janell Hilgers, Kirk Brown and William Pearman ("the State Officials") violated this Court's decision in *Rutan v. Republican Party*, 497 U.S. 62 (1990). It is undisputed that the State Officials did consider, among other things, the political affiliation of some candidates for the position of temporary highway maintainer before July 6, 1994. However, before the district court made its legal ruling below on July 6, 1994, no court had ever considered whether *Rutan* extended to temporary employees -- individuals who, at least under Illinois law, may be hired for just one day or up to six months and who do not receive the benefits (other than a salary) of State employment. Consequently, the district court held that the State Officials were entitled to qualified immunity from damages on Petitioner's claims because before July 6, 1994, it was not clearly established that the protections in the *Rutan* decision extended to temporary workers. The Seventh Circuit affirmed the district court's ruling on qualified immunity. The district court and Seventh Circuit's ruling granting qualified immunity in the *Vickery* case is in complete agreement with the ruling of the district court and Seventh Circuit judges who considered the same issue in another Seventh Circuit case, *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996).

Petitioner now asks this Court to issue a writ of certiorari to review the Seventh Circuit's grant of qualified immunity. The Petition fails to demonstrate any proper

ground for granting review. The bulk of Petitioner's argument is an unfounded attack on the Seventh Circuit's proper application of the well-settled, uncontroversial qualified immunity standard to the undisputed facts of this case. That attack, even if (contrary to the opinion of eight federal judges) it had merit, does not warrant the issuance of a writ. Accordingly, the State Officials respectfully request that the Court deny the Petition.[1]

STATEMENT OF THE CASE

A. The State Officials' Temporary Highway Maintainer Hiring Practices.

IDOT is responsible for the design, construction and maintenance of approximately 42,000 lane-miles of roadways across the State of Illinois. (Pet. at A-3; R. 88, Ex. B ¶ 3.[2])

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[1] The Petition also seeks review of the Seventh Circuit's holding as to the Saline County Republican Central Committee and William Roberts ("the Party Respondents"). In his Second Amended Complaint, Petitioner alleged that the Party Respondents were liable for the alleged violation of Petitioner's First Amendment rights because the Party Respondents acted in concert with the State Officials. The district court dismissed the claim against the Party Respondents because *Rutan* did not prohibit the dissemination of information by party members about a job candidate's political affiliation or the making of recommendations in favor of job candidates by party members. The district court also held that these activities were not actionable because they constituted protected expression. (Pet. at A-16 to A-17.) The Seventh Circuit affirmed. (Pet. at A-16 to A-22.) The State Officials do not address these issues in this Opposition because the ruling regarding the Party Respondents does not relate to the conduct or the liability of the State Officials.

[2] Throughout this Opposition, we use the following abbreviations to cite to relevant materials: "Pet." refers to the Petition for Writ of Certiorari; "R." refers to the numbered documents in the record on appeal below;

(continued...)

To fulfill these responsibilities, IDOT relies on a rank-and-file workforce of "highway maintainers." (Pet. at A-3; R. 88, Ex. B ¶ 3; R. 88, Ex. A. ¶ 4.) In 1994, IDOT employed approximately 1,940 permanent, full-time highway maintainers across the State. (8/31/94 Tr. at 63.) In order to meet the varying seasonal demands of its statutory mission (primarily the increased demands during the winter created by IDOT's snow removal duties) and to save the taxpayers money, IDOT also relies on the appointment of highway maintainers to temporary, seasonal positions. (Pet. at A-14; R. 94 at 10; 8/31/94 Tr. at 63; *id.* at 149-52; R. 88, Ex. A ¶ 4; *id.* Ex. B ¶ 4.) For the 1993 winter season, IDOT hired approximately 400 temporary highway maintainers, and IDOT had 800 additional persons on call if they were needed during severe weather. (Pet. at A-3; R. 94 at 11; R. 88, Ex. A ¶ 7; R. 88, Ex. B ¶ 5.)

Under the Illinois Personnel Code, temporary state employees share few of the benefits enjoyed by full-time state employees. Appointment to a particular temporary position (including temporary highway maintainer) may last as short as one day but in no event longer than six months in any twelve month period. 20 ILCS 415/8b.9. Temporary highway maintainers may not be transferred or promoted, Ill. Admin. Code tit. 80, Ch. I §§ 302.335, 302.450; offers of temporary employment do not constitute recall or reinstatement, Ill. Admin. Code tit. 80, Ch. I § 303.590(b);

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[2] (...continued)
"J. App." refers to the page number of the Joint Appendix filed in the Seventh Circuit by Petitioner separate from his main brief; "P. Br." refers to Petitioner's opening brief before the Seventh Circuit; and "8/31/94 Tr." refers to the transcript of the hearing on Petitioner's petition for a preliminary injunction, which was included in the record on appeal below.

and unlike permanent employees, temporary highway maintainers cannot invoke the strict statutory protections which limit the manner and circumstances in which full-time civil service employees may be discharged. In addition, temporary highway maintainers are not entitled to a wide range of other benefits afforded full-time employees, including (1) health insurance coverage, (2) pension plan participation, (3) sick leave, (4) personal leave, (5) leave of absence, (6) family responsibility leave, (7) paid leave for jury duty, (8) leave for military physical examinations, (9) leaves of absence for military service, (10) disaster service leave with pay, (11) voluntary reduction, or (12) vacation time. Ill. Admin. Code tit. 80, Ch. I §§ 302.220, 302.505, 303.90, 303.125, 303.140, 303.148, 303.171, 303.175, 303.180, 303.250. Temporary employees cannot accumulate continuous service. Ill. Admin. Code tit. 80, Ch. I § 302.250. Temporary employees also are exempt from the Service Men's Employment Tenure Act; as a result, they are not entitled to restoration to their temporary job after completion of military service. 330 ILCS 60/7.

Before July 6, 1994, the State Officials considered a variety of factors in appointing temporary highway maintainers, including political support or recommendations. (Pet. at A-4; J. App. at 8-11.) The State Officials did not view this Court's decision in *Rutan* as covering temporary workers for two reasons. *First*, the majority opinion in *Rutan* was premised in large part on the burdens which the patronage employment system alleged in that case placed on career employees; for example, career employees generally receive regular paychecks and increases in pay, which were compromised or denied to applicants or employees who allegedly could not obtain full-time positions without political

support. *See* 497 U.S. at 73, 77. The State Officials believed that this reasoning did not apply to temporary employees, whose term of employment is restricted in any event by Illinois statute and who receive no benefits besides a paycheck. *Second*, there was a well-established line of cases in the Seventh Circuit which held that independent contractors were not covered by the *Rutan* principles. (The reasoning of these cases was not repudiated until 1996 when this Court decided *O'Hare Truck Service v. City of Northlake*, 116 S. Ct. 2353 (1996).) The State Officials believed that because temporary employees enjoyed few of the benefits of full-time employees, temporary employees were more like *Rutan*-exempt independent contractors than like permanent employees. (R. 28.) As a consequence, before the district court's decision on July 6, 1994, the Sate Officials believed they were constitutionally permitted to favor temporary highway maintainer position candidates who were supported by the Republican Party, and they generally did so. (Pet. at A-4; J. App. at 11-12.)

B. The Decision In The District Court.

The State Officials moved to dismiss Petitioner's claims on the ground that the allegation that the State Officials considered political affiliation when appointing temporary highway maintainers did not state a claim for relief under 42 U.S.C. § 1983 and the First Amendment. The State Officials maintained that the *Rutan* decision did not extend to positions -- like the temporary highway maintainer positions here -- which do not provide the holder with the benefits of career employment. (R. 28.) The State Officials also demonstrated that even if the district court found that *Rutan* extended to temporary employees, the damage claims asserted against the State Officials should be dismissed under

the doctrine of qualified immunity because it was not "clearly established" that *Rutan* extended to temporary employees.

On July 6, 1994, the district court denied in part the State Officials' motion to dismiss and held that *Rutan* extends to temporary workers. (Pet. at C-13 to C-22.) Recognizing that no court had previously ruled on the question, however, the court dismissed the damages claim against the State Officials on qualified immunity grounds. (Pet. at C-22 to C-26.) On the issue of qualified immunity, the district court rejected Petitioner's assertion -- his *only* argument against qualified immunity before the district court -- that *Rutan* itself decided the question. The court noted that Ricky Standefer, one of the plaintiffs in *Rutan*, had once been a temporary employee. (Pet. at C-25.) But, the court explained (*id.*):

> "the mere fact that this [temporary] status was mentioned is not dispositive of the issue. What is critical is whether the parties *argued* that his status as a temporary employee would affect his claim or whether the Supreme Court expressed any opinion as to whether such status might be relevant. There is no indication that Standefer's status as a temporary employee was raised as an issue. Nor is there anything in *Rutan* to suggest that the Supreme Court took this status into consideration . . . Accordingly, the Court finds that at the time of the alleged violation, it was not 'clearly established' that *Rutan* applied to temporary employees."

In response to the district court's ruling that *Rutan* extended to temporary employees, the State Officials took immediate measures to halt the consideration of political

affiliation in the appointment of all temporary state employees. (Pet. at A-5; J. App. at 17-19, 21-29.) The State Officials answered the Second Amended Complaint, and after preliminary injunction proceedings not relevant to the Petition, moved for judgment on the pleadings on Petitioner's remaining claims for injunctive and declaratory relief. On December 6, 1995, after an interlocutory ruling regarding Petitioner's claims and the settlement of his individual claim for instatement, the district court entered a final judgment which granted a declaratory judgment in favor of Petitioner (and the classes he represented) that the State Officials' "use of political affiliation as a criterion for hiring temporary highway maintainers is unconstitutional [under] *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)"; the final judgment denied Petitioner any other relief. (Pet. at B-1 to B-3.)

C. The Decision In The Court Of Appeals.

Petitioner appealed the district court's ruling granting qualified immunity to the State Officials, and the State Officials cross-appealed the district court's entry of a declaratory judgment. The Seventh Circuit affirmed the district court opinion in all respects.[3] On the issue of

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[3] In their brief before the Seventh Circuit, the State Officials also argued that the district court's ruling on the merits -- that *Rutan* extended to temporary employees -- was erroneous. The State Officials' position was premised in large part on the long line of Seventh Circuit cases, culminating in *O'Hare Truck Service v. City of Northlake*, 47 F.3d 883 (7th Cir. 1995), which held that *Rutan* did not apply to independent contractors. After the Supreme Court issued its decision reversing the Seventh Circuit's decision in *O'Hare Truck Service v. City of Northlake* (116 S. Ct. 2353 (1996)) during the pendency of the appeal in the Seventh Circuit, the State Officials acknowledged that the temporary highway maintainer position was covered by *Rutan*.

qualified immunity, the Seventh Circuit first noted that a different panel of the court had recently decided *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996), a case which raised issues very similar to those raised in this case. In *Tarpley*, the Seventh Circuit affirmed the district court, which found that Illinois State officials who had considered political affiliation when making a temporary appointment were entitled to qualified immunity because the application of *Rutan* to temporary employees was not clearly established in 1992. (Pet. at A-5 to A-6.)

Addressing Petitioner's arguments in this case, the Seventh Circuit first rejected the Petitioner's contention that prior cases in this Court had clearly established that *Rutan* applied to temporary employees. (Pet. at A-8 to A-11.) The Seventh Circuit noted that the cases cited by Petitioner all involved "the discharge of a full-time non-civil service employee based on political association," and that Petitioner's attempt to analogize this Court's prior cases to this case "is not persuasive." (*Id.* at A-8.) While the court recognized that one plaintiff in the *Rutan* case had once been a temporary garage worker, it noted that "it was far from clear that the Supreme Court made its decision on that basis." (*Id.* at A-9.) The Seventh Circuit concluded (*id.* at A-10 to A-11):

> "[Petitioner] has not provided a 'closely analogous' case that covers both the *Rutan* holding and its application to temporary employment positions like the temporary highway maintainer positions, nor has he shown that using information regarding an applicant's political affiliation was so obviously unconstitutional that the [State

> Officials] should have known that they were violating the law."

The Seventh Circuit also rejected Petitioner's argument that certain actions and pronouncements of Illinois State officials following the *Rutan* decision deprived the State Officials in this case of qualified immunity. (*Id.* at A-11 to A-12.) Petitioner argued that Illinois State officials had "deceived" the public by not including temporary employees on the publicly-posted lists of employees which the State had determined were exempt from the *Rutan* decision under the *Branti* exception, but nonetheless treating temporary employees as exempt. (*Id.* at A-11.) The court held that Petitioner had not "provided sufficient evidence that any deliberate deception was practiced" by the State Officials. (*Id.* at A-12.) The court also held that, even if there were such evidence, Petitioner had failed to offer any legal theory on which the actions and pronouncements of other State officials could deprive the State Officials in this case of qualified immunity: "the [Petitioner] has not cited any authority that would support a finding that the State's public pronouncements affect the [State Officials'] entitlement to

qualified immunity from federal constitutional claims."[4] (*Id.*)

REASONS FOR DENYING THE WRIT

The Court should deny the Petition because it is nothing more than an attempt to have the Court review the Seventh Circuit's application of settled law to the facts in this case. Although the Petition purports to identify three questions pertaining to the State Officials (numbers 3-5), it actually presents just one issue: whether the State Officials were entitled to qualified immunity from damages for considering political affiliation when hiring temporary highway maintainers prior to July 6, 1994. There is nothing in the Seventh Circuit's resolution of that issue which warrants this Court's exercise of its certiorari review authority under the criteria specified in Supreme Court Rule 10.

First, as we show in Part A, the Seventh Circuit's opinion below does not present an "important question of federal law" that warrants certiorari review. *Second*, as we demonstrate in Part B, the Seventh Circuit's opinion below does not conflict with the decision of any other United States

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[4] The Seventh Circuit made three additional rulings not relevant to the Petition as it relates to the State Officials. First, the court rejected another qualified immunity theory Petitioner pressed below -- that the State Officials had engaged in a deliberate "scheme" to "circumvent" *Rutan*; Petitioner does not seek review of this ruling. Second, the court affirmed the entry of a declaratory judgment in favor of Petitioner over the State Officials' Eleventh Amendment objection; the State Officials do not seek review of that ruling. Third, the court affirmed the district court's dismissal of the claim against the Party Respondents; the State Officials do not address the issues relating to the Party Respondents. (Pet. at A-16 to A-22.)

court of appeals. *Third*, as we demonstrate in Part C, there is nothing exceptional or compelling about this case which warrants review even in the absence of any other consideration favoring certiorari review.

A.

Petitioner Does Not Identify Any Important Question Of Federal Law Decided By The Seventh Circuit That Warrants Certiorari Review.

The "reasons" Petitioner offers for granting the writ are little more than a reargument of the merits of his position on qualified immunity, which was rejected by the district court and Seventh Circuit below, as well as by the district court and the Seventh Circuit in the *Tarpley* case. As we demonstrate in Part C below, Petitioner's arguments do *not* have merit, which is a separate and independent reason for denying the Petition. However, even assuming, contrary to fact and for the sake of argument only, that Petitioner's arguments on the underlying merits were persuasive, his arguments do not show he is entitled to a writ. As we demonstrate below, Petitioner (1) does not identify an "important" federal question, and (2) even if he did, the analysis by the Court of Appeals is entirely consistent with the decisions of this Court.

1. The opinion below does not implicate any "important" federal question.

The legal standard governing qualified immunity has been well-defined by this Court. The Seventh Circuit's opinion below applies the established law to the facts of this case, and does not raise any additional, novel or "important" federal legal questions. Moreover, because the qualified immunity inquiry is highly fact-specific, the importance of

any individual qualified immunity decision applying the proper law to the facts -- like the decision below -- is limited to other cases with very similar facts. Consequently, the Petition does not warrant certiorari review to address any important federal question.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court announced the now-accepted test for qualified immunity. Rejecting the common law "subjective" element of the test, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* Whether a government official is entitled to qualified immunity turns on the "objective legal reasonableness" of the official's action, which is assessed in light of the "legal rules that were 'clearly established' at the time the action was taken." *Id.* at 819, 818.

In *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), the Court further explained that rights allegedly violated by the government official must be evaluated in a "particularized" sense. Thus, the lawfulness of the government official's action turns on a "fact-specific" inquiry taking into account all of the circumstances confronting the government official. *Id.* at 641. These principles have been repeated so often by this Court and the Seventh Circuit that they are, themselves, "clearly established" and cannot be controversial in any sense. (Indeed, the Seventh Circuit has stated these principles so often that it often omits an extended discussion of the principles as repetitious. *See, e.g. Anderson v. Holmes*, 16 F.3d 219, 221 (7th Cir. 1994).)

The effect of this Court's *Anderson* decision has been to limit the precedential value of individual qualified immunity cases to future cases with almost identical facts. In response to this Court's command in *Anderson*, the Seventh Circuit (and other lower courts) have explained the key role that the particular facts of a case play in the qualified immunity determination. "Once the defendant's actions are defined or characterized according to the specific facts of the case this characterization is compared to the body of law existing at the time of the alleged violation to determine if constitutional, statutory, or case law shows that the now specifically defined actions violated the clearly established law." *Glass v. Dachel*, 2 F.3d 733, 745 (7th Cir. 1993). Consequently, the specific facts in each case are critical in addressing the defense of qualified immunity. *Id.* Thus, where (as here) the general right is well-established, the crucial question remains whether "the law was clear in relation to the specific facts confronting" the official at the time of the conduct. *Scott v. Glumac*, 3 F.3d 163, 164 (7th Cir. 1993).

The Petition fails to identify an important federal question justifying review because the Seventh Circuit correctly applied these established qualified immunity principles, and the Seventh Circuit's application of these principles to the facts of this case has no general, substantive application beyond the borders of this particular case. Petitioner fails to identify any defect with the Seventh Circuit's articulation of the legal standard for determining qualified immunity. Indeed, the opinion below properly explains that qualified immunity shields government officials unless they violate "clearly established" rights "of which a reasonable person would have known"; that the inquiry

"turns on the 'objective legal reasonableness' of the action"; and that to avoid qualified immunity the plaintiff must show that the right was clearly established by either providing a "'closely analogous' case covering both the right at issue and its application to the facts of the case at hand or showing that a reasonable person would have known that they were violating the law because such violation was so obvious." (Pet. at A-7 to A-8.) The Seventh Circuit therefore did not err when it recited the legal standard for evaluating qualified immunity claims.

What is left is the court's application of that standard to the facts of this case which, in general, is not a sound reason to grant the writ. Supreme Court Rule 10. In this case, as demonstrated below in Part C, the Seventh Circuit's application was absolutely proper, and the result correct. However, even assuming some error in that application, that error would not constitute an important legal question of any general relevance or application because the qualified immunity standard is so fact specific. The reach of the Seventh Circuit's ruling is strictly limited to *Rutan* claims involving temporary employees, and to conduct occurring before July 6, 1994.[5] This ruling, even if (contrary to fact)

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[5] Indeed, the statute of limitations has already run on any action arising in Illinois based on any conduct which would be affected by the opinion below. The opinions below only determined that before July 6, 1994, it was not clearly established that *Rutan* extended to temporary workers. The statute of limitations for claims under Section 1983 for *Rutan* violations arising in Illinois is two years (*see Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 952 (1997)), so the statute ran on any claim affected by the decision below two years from the date the district court issued its opinion, or on July 6, 1996. Consequently, the application of the qualified immunity standard in this

(continued...)

it were erroneous, does not amount to an important question of federal law which justifies the Court's exercise of its scarce certiorari jurisdiction.

2. The opinion below is consistent with this Court's decisions.

Even if Petitioner could identify an important question of federal law raised by the decision below, review by the Court still is not warranted because the Seventh Circuit's opinion is completely consistent with this Court's decisions. Petitioner nowhere explicitly contends that a writ should issue because the opinion below conflicts with a particular ruling of this Court. However, in his attempt to demonstrate that the Seventh Circuit wrongly applied the law to the facts here, Petitioner twice implies that the Seventh Circuit's opinion is contrary to this Court's decisions. Petitioner is wrong in both instances.

First, Petitioner apparently contends that the Seventh Circuit's use of a wholly "objective" standard for qualified immunity conflicts with this Court's opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). (Pet. at 19-20.) In support of his contention, Petitioner misleadingly cites only the concurring opinion of Justice Brennan in *Harlow*, and with good reason: Justice Brennan's concurrence does not reflect the opinion of the Court or its later decisions concerning the objective nature of the qualified immunity inquiry. In

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[5] (...continued)
case would have precedential value only for a very limited group of possible cases: other *Rutan* actions concerning temporary employees filed by July 6, 1996, that concerned conduct which occurred before July 6, 1994. The State Officials are not aware of the pendency of any such cases.

Harlow, the opinion of the Court abolished the "subjective aspect" of the qualified immunity analysis because the costs of adjudicating subjective intent were too high. 457 U.S. at 815-19. Since *Harlow*, it has been well-settled that the qualified immunity test is, in the first instance, a purely objective one. *See, e.g., Behrens v. Pelletier*, 116 S. Ct. 834, 838 (1996) (test is "objective" and not based on defendant's "good faith"); *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (test is now "wholly objective"); *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (*Harlow* "completely reformulated qualified immunity" inquiry to replace "subjective" inquiry with "objective" test); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (*Harlow* "purged qualified immunity doctrine of its subjective components"). The opinion below does not conflict in any way with this Court's qualified immunity jurisprudence in *Harlow* or any other case.

Second, Petitioner apparently contends that the Seventh Circuit's opinion conflicts with this Court's prior decisions because they "clearly established" that *Rutan* extends to temporary employees. (Pet. at 22-26.) But this Court has never been presented with the question whether *Rutan* extends to temporary employees, and none of the cases cited by Petitioner even broached that subject. The Court's decision in *Perry v. Sindermann*, 408 U.S. 593 (1972) did not involve the political association rights of temporary employees; it involved the free speech rights of a college professor who was employed pursuant to four successive one-year contracts. The plaintiffs in *Elrod v. Burns*, 427 U.S. 347 (1976), were permanent, full-time office staff, including a bailiff, a process server, and a division supervisor in the Cook County Sheriff's Office, who sued the new

Sheriff for discharging them solely because they refused to support and were not sponsored by the Democratic Party. 427 U.S. at 350-51. The plaintiffs in *Branti v. Finkel*, 445 U.S. 507 (1980), were two assistant public defenders who had served for several years before they were dismissed by the new Public Defender for political reasons. 445 U.S. at 509. And, although one plaintiff in *Rutan* had been a temporary garage worker (497 U.S. at 67), as the district court and Seventh Circuit held, "it was far from clear that the Supreme Court made its decision on that basis." (Pet. at A-9.) In sum, as the Seventh Circuit held: "Prior to the district court's July 6, 1994 opinion, no court had explicitly decided the question whether the protection afforded in *Rutan* extended to temporary workers." (*Id.*) The Seventh Circuit's holding that *Rutan*'s extension to temporary employees had not been "clearly established" by this Court does not conflict with any decision of this Court.

B.

Petitioner Does Not Identify Any Circuit Split Over The State Officials' Entitlement To Qualified Immunity.

Petitioner does not identify any conflict between the Seventh Circuit's holding that the State Officials were entitled to qualified immunity on the facts of this case and a holding of another United States court of appeals. Indeed, petitioner cannot do so, because no other court of appeals has *ever* addressed whether state officials who considered political affiliation when filling temporary positions were entitled to qualified immunity. Put simply, there is no other opinion with which the Seventh Circuit's holding could conflict.

Nonetheless, petitioner generically contends that the courts of appeal "are sharply divided on the issue of qualified immunity in patronage cases." (Pet. at 26.) In support of this contention, Petitioner cites to but one opinion -- the Sixth Circuit's decision in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996). Petitioner asserts that under *McCloud*, state officials' entitlement to qualified immunity for an alleged violation of *Rutan* depends "on the *nature of the position*," and that had he been able to bring his action in the Sixth Circuit, the State Officials "would not have been entitled to qualified immunity." (Pet. at 26, 29.) Petitioner is wrong.

Petitioner's citation to *McCloud* is a misleading attempt to manufacture a conflict between circuits where none exists. The issue in this case -- whether it was clearly established before July 6, 1994 that *Rutan* extended to temporary employees -- was never even raised in the *McCloud* case because no plaintiff in that case was a temporary employee. In *McCloud*, nine permanent, full-time employees of the Auditor of Franklin County, Ohio sued Joseph Testa after Testa was appointed auditor and fired the plaintiffs. The plaintiffs contended that their firings were improper patronage dismissals, and sued Testa for an alleged violation of the First Amendment. Testa moved for summary judgment, contending that he was entitled to qualified immunity because it was not clearly established that the plaintiffs' positions fell outside the exception in *Branti*, but the district court denied his motion. On interlocutory appeal, the Sixth Circuit noted that in *Branti* this Court created a distinction between workers based on their duties. Ultimately, the Sixth Circuit held that Testa was entitled to qualified immunity as to one of the nine plaintiffs, but that the issue of qualified immunity could not be resolved with

respect to the others on summary judgment because of factual disputes concerning the duties of the plaintiffs' positions. 97 F.3d at 1553-62.

The *McCloud* case has nothing whatsoever to do with the issue the Seventh Circuit and the district court decided below. The issue here is very narrow: whether the State Officials were entitled to qualified immunity from damages for their consideration of political affiliation when hiring *temporary* highway maintainers prior to July 6, 1994. None of the plaintiffs in *McCloud* was a temporary employee. Furthermore, *McCloud* analyzed the *Branti* exception to *Elrod* and *Rutan*, which was not at issue in this case; neither the district court nor the Seventh Circuit below held that the "nature of the position" -- i.e., the duties of the position -- is irrelevant for purposes of determining whether qualified immunity is available under *Branti*.[6] And the Sixth Circuit never held in *McCloud* that no considerations *other* than the *Branti* exception, such as the temporary nature of a position, might entitle a state official to qualified immunity; the Sixth Circuit never even addressed that issue. The questions posed and answered here and in *McCloud* are wholly different, and neither opinion even addresses the question posed in the other case.

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[6] Indeed, the existence of the *Branti* exception applied in *McCloud* is well-settled in the Seventh Circuit, and the Seventh Circuit has applied the exception to determine the availability of qualified immunity in many cases. *See, e.g., Hernandez v. O'Malley*, 98 F.3d 293, 296-97 (7th Cir. 1996); *Mitchell v. Thompson*, 18 F.3d 425, 427 (7th Cir.), *cert. denied*, 115 S. Ct. 191 (1994); *Pounds v. Griepenstroh*, 970 F.2d 338, 340 (7th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993); *Upton v. Thompson*, 930 F.2d 1209, 1213 (7th Cir. 1991).

Moreover, analytically, these two decisions address completely different steps in First Amendment analysis. Below, the Seventh Circuit granted the State Officials qualified immunity because it was not clearly established that the promise or loss of a temporary position based on political affiliation was a significant burden on First Amendment freedoms because temporary employees in Illinois receive little more than a paycheck, for a limited period of time. (Pet. at A-8 to A-9.) That holding addresses the prima facie element of a plaintiff's First Amendment claim, that is, the need to show a significant burden on protected conduct. *Cf. Rutan*, 497 U.S. at 71. In distinction, the *McCloud* case addressed the applicability of the *Branti* standard, which goes not to what the plaintiff must show to prevail, but to whether the defendant government official can avoid liability by showing a compelling government interest in order to satisfy strict scrutiny. *Id.* There simply is no conflict between *McCloud* and the Seventh Circuit's opinion below.

Petitioner's citation (at 28-29) to certain language in *McCloud* concerning the difference between uncertainty in the facts and the law likewise fails to demonstrate any circuit split. In this case, the facts presented to the Seventh Circuit, and in particular the facts concerning the duties of temporary highway maintainers, were completely undisputed. (*See* Pet. at 29 (the State Officials "admitted the duties of the temporary position were *identical* to the duties of the permanent position") (emphasis in original); Pet. at A-3; J. App. at 6.) Thus, contrary to Petitioner's implication, the Seventh Circuit did not hold in this case that a qualified immunity determination can be made based on factual uncertainty as to the duties of a particular position.

In this case, the Seventh Circuit simply held that prior to Petitioner's lawsuit, the law was not clearly established that *Rutan* extended to temporary employees. In order to show a circuit split, Petitioner would need to identify a case from another circuit in which the court concluded that the application of *Rutan* to temporary employees *had* been clearly established prior to July 6, 1994. Petitioner has failed to cite any such case, and there is therefore no circuit split requiring resolution by this Court.

C.

This Is Not An Exceptional Case Warranting Certiorari Review Of The Seventh Circuit's Straightforward Application Of Settled Law To The Facts.

Petitioner has not shown -- and cannot show -- that review is warranted by the Court. There is no important issue of federal law that the Court should settle, no conflict with any decision of this Court, and no conflict among the circuit courts of appeal. What remains is the Seventh Circuit's unremarkable application of well-settled qualified immunity principles to the particular facts of this unique case. Under these circumstances, as the Court makes clear in Rule 10, a petition for certiorari review is "rarely granted," and Petitioner has not shown that there is any exceptional element present in this case that justifies review by this Court. In particular, review is not warranted here because the Seventh Circuit's reasoning and result were correct and just, and therefore the Court need not intervene to correct an injustice.

Eight different federal judges have determined that the State Officials were entitled to qualified immunity from damages for considering political affiliation when filling

temporary positions prior to July 6, 1994: Judge Foreman in the district court below (Pet. at C-22 to C-26); a unanimous panel of the Seventh Circuit below (Pet. at A-6 to A-16); Judge Gilbert, the district court judge in the *Tarpley* case; and a unanimous panel of three different judges of the Seventh Circuit in *Tarpley* (96 F.3d at 927). The question of qualified immunity turns, of course, on the clarity of the legal rule at the time of the conduct at issue. *Harlow*, 457 U.S. at 818. Given that eight judges who have examined the law as it stood in 1994 have determined that it was unclear, it is unreasonable -- and contrary to the purpose of qualified immunity -- to expect state officials to anticipate that a different court would come to a contrary conclusion. *Id.*; *Hernandez v. O'Malley*, 98 F.3d 293, 296-97 (7th Cir. 1996). Consequently, the decisions of the district court and the Seventh Circuit which granted the State Officials qualified immunity from damages were correct, fair, and just.

Despite the unanimous decision of an eight-member "jury" of judges, Petitioner's entire argument is that the Seventh Circuit's opinion was wrong for two reasons. Neither reason has merit.

1. This Court's decisions did not clearly establish the law concerning temporary workers.

Petitioner contends that the State Officials are not entitled to qualified immunity because this Court's decisions in *Perry*, *Elrod*, *Branti* and *Rutan* clearly established that *Rutan* extends to temporary employees. (Pet. at 22-26.) As we explained above in Part A.2, Petitioner is simply wrong: except for *Rutan*, none of the cases he cites even involved temporary employees, so in the fact-specific qualified immunity inquiry, they could not have clearly established the law as to temporary employees. And although one plaintiff

in *Rutan* had been a temporary employee, there was no issue about that plaintiff's temporary status in *Rutan*. As the Seventh Circuit and district court observed below (Pet. at A-9 (emphasis in original)):

> "[T]he fact that the worker's prior status as a temporary worker was mentioned in connection with the *Rutan* decision is not dispositive; '[w]hat is critical is whether the parties *argued* that his status as a temporary employee would affect his claim or whether the Supreme Court expressed any opinion as to whether such status might be relevant.'"

Petitioners have not demonstrated (and cannot demonstrate) any error in the unanimous decision of eight federal judges that the law concerning temporary employees was not clearly established before July 6, 1994.

2. Illinois state administrative orders cannot deprive the State Officials of qualified immunity.

Citing a number of administrative orders and lists generated by Illinois State officials, Petitioner contends that the State Officials are not entitled to qualified immunity from federal constitutional claims because they are "bound" by their own orders. (Pet. at 19-22.) Petitioner asserts that orders and lists issued by Illinois State officials were supposed to list all employees who were exempt from *Rutan*, and that the orders and lists issued did not mention any temporary employees. (Pet. at 20-21.) Petitioner contends that the orders he cites "correctly stated the law"; the State Officials were "bound" by these orders; the orders "correctly state what the [State Officials] knew"; and therefore to allow

the State Officials qualified immunity would make a "mockery of the doctrine." (Pet. at 22.) Petitioner's reliance on these state-generated documents in his attempt to demonstrate that the Seventh Circuit erred in granting the State Officials qualified immunity from *federal constitutional claims* is completely misplaced for three reasons.

First, Petitioner has waived the *legal* argument he now makes because he never presented it to the district court or the Seventh Circuit below. In this Court, Petitioner contends that the State Officials are not entitled to qualified immunity based on these orders because they demonstrate that the State Officials "actually knew" that their actions violated the law. (Pet. at 20; *see also id.* at 22.) Petitioner never made this argument to the district court or the Seventh Circuit. (P. Br. at 23-27.) To be sure, Petitioner cited the factual materials -- the administrative orders and the lists of *Branti*-exempt employees -- before the Seventh Circuit. (P. Br. at 23-26.) However, Petitioner's legal argument before the Seventh Circuit was that the State Officials should not be entitled to qualified immunity because they had run a "secret patronage system," and to give them qualified immunity would be "to reward deception." (P. Br. at 24, 27.) Petitioner *never* argued, as he does exclusively now, that the orders and lists showed that the State Officials actually knew that they were violating the law, or even that if they did, that would deprive them of qualified immunity. The Court should not even consider this "reason" for granting the writ, because it was waived.

Second, even if it were not waived, Petitioner's new argument lacks any factual basis because the orders and lists cited by Petitioner do not establish what the State Officials knew concerning the state of patronage jurisprudence as to

temporary workers. Petitioner asks the Court to infer, based on the fact that these state-generated documents relating to the *Branti* exception did not mention temporary workers, that the State Officials in this case knew that it was clearly established under federal constitutional law that *Rutan* extended to temporary workers. This is neither a fair nor logical inference. As we have shown above, the *Rutan* decision did not address or even involve the filling of temporary positions; consequently, the orders, manuals and other documents interpreting and implementing that decision generated by Illinois State officials had no reason to address the issue raised in this case. The omission of any discussion of temporary employees from the documents dealing with the *Branti* exception cited by Petitioner in no way undermines the purely legal judgment made by the State Officials, in mid-1991, that the *Rutan* decision does not apply to temporary appointments for reasons wholly unrelated to the *Branti* exception. (*See* 8/31/94 Tr. at 20.)

Third, Petitioner's argument lacks any legal basis because the State Officials' alleged intent to violate the law is irrelevant. As we demonstrated above, the state of the State Officials' subjective belief about the legality of their conduct is simply not an issue in the objective post-*Harlow* qualified immunity analysis. *Behrens*, 116 S. Ct. at 838; *Wyatt*, 504 U.S. at 166; *Anderson*, 483 U.S. at 645; *Mitchell*, 472 U.S. at 517. Even if, contrary to fact, Petitioner could show that the State Officials subjectively believed that their actions violated the law, the State Officials would still be entitled to qualified immunity unless the Petitioner was able to demonstrate that the State Officials' conduct in fact violated "clearly established" objective law.

To the extent that Petitioner continues to urge that qualified immunity is inapplicable because the State Officials are "bound" by the administrative orders and lists, Petitioner has not cited (and cannot cite) any authority whatsoever to support his argument. While Petitioner appears to suggest that some type of equitable estoppel should apply, in general, statements by government officials do not provide a basis for equitable estoppel against the government. *Crown v. U.S. Railroad Retirement Board*, 811 F.2d 1017, 1020 (7th Cir. 1987). Even assuming (for the sake of argument) that the State Officials could be estopped from arguing that *Rutan* does not extend to temporary employees, Petitioner has presented no evidence to satisfy the basic requirements of an estoppel claim, including but not limited to the essential element of a knowing misrepresentation or concealment of a material fact. *See Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 280 (7th Cir. 1994).

Moreover, even assuming (contrary to fact and law) that Petitioner had some type of estoppel claim, plaintiffs have not even attempted to show how a common law estoppel argument can affect the State Officials' *entitlement to qualified immunity from federal constitutional claims* on the facts here. For qualified immunity, the only question is whether, given the particular facts of this case, the State Officials' conduct violated clearly established federal law. *Harlow*, *supra*; *Anderson*, *supra*. Adding Petitioner's unfounded allegation that certain Illinois State officials failed to disclose that temporary employees were being treated as exempt from *Rutan* into the factual mix, the qualified immunity question becomes whether the State Officials violated clearly established law by appointing temporary highway maintainers on the basis of (among other factors)

political affiliation without informing the general public that political affiliation was considered. Petitioner has been no more successful at locating "clear" authority regarding a secret system than he was at finding "clear" authority concerning *Rutan*'s application to temporary employees. The Seventh Circuit properly rejected Petitioner's unfounded contention and granted the State Officials qualified immunity.

CONCLUSION

For the foregoing reasons, Respondents request that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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